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# In the Supreme Court
OF THE
# United States

October Term, 1993

JAMES H. STANTON, WINNIFRED STANTON, and their marital community, and ALBANY INSURANCE COMPANY, et al.,

Petitioners,

vs.

BAYLINER MARINE CORPORATION,

Respondents.

**On Writ of Certiorari to the Supreme Court of the State of Washington**

## PETITION FOR WRIT OF CERTIORARI

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72 pp

## QUESTIONS PRESENTED FOR REVIEW

In East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), this Court ruled that admiralty law does not afford a remedy against the manufacturer of a commercial ship for defects which cause only economic loss. This Petition presents the following questions for review:

1. Does East River apply to recreational boats which are mass-produced and sold through local dealerships to consumers who cannot negotiate with respect to the manufacturer's liability for manufacturing defects?

2. If East River applies, are state legislatures barred by the uniformity doctrine of Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), from providing local consumers a remedy against the manufacturer for defects which cause only economic loss?

3. Can a state product liability statute of general application be preempted merely because the state

legislature did not refer specifically to maritime claims, without considering whether there is any federal interest in uniformity of law as to the rule of East River?

## LIST OF PARTIES

Petitioners are James H. Stanton and Winnifred Stanton and their marital community, Stanton Investment Company, Inc., and Albany Insurance Company. The respondent is Bayliner Marine Corporation ("Bayliner"). Olympic Boat Sales, Inc. was the only other party in the lower court proceedings.

## RULE 29.1 STATEMENT OF RELATED CORPORATIONS

Stanton Investment Company, Inc. is not related to any other corporation. Albany Insurance Company is a wholly-owned subsidiary of GRE Insurance Group. The other subsidiaries of GRE Insurance Group have no relationship to Albany Insurance Company except for being owned by a common parent.

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Petitioners,

vs.

BAYLINER MARINE CORPORATION,

Respondents.

**On Writ of Certiorari to the Supreme Court of the State of Washington**

## PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in these proceedings on March 10, 1994.

## JURISDICTION IN THE COURTS BELOW

Petitioners brought this action in the Superior Court for the State of Washington in King County, which exercised subject matter jurisdiction under Revised Code of Washington (RCW) 2.08.010 and in personam jurisdiction under RCW 4.28.185. The court of appeals exercised jurisdiction over petitioner's appeal pursuant to RCW 2.06.030 and RAP 2.2(a)(1). The Washington Supreme Court exercised jurisdiction over respondent's petition for review under RCW 2.04.010 and RAP 13.4(b).

## COURSE OF PROCEEDINGS AND DISPOSITION BELOW

In separate transactions, James H. Stanton and Wiley Dean Henry purchased recreational boats which were manufactured by Bayliner and sold through Olympic Sales,

Inc., doing business as Olympic Boat Centers. Both vessels were insured by petitioner Albany Insurance Company. Both vessels sank due to an alleged manufacturing defect. No one was injured in either incident. Albany paid its insureds under their respective policies and became subrogated to their interests.

Albany and Henry brought an action against Bayliner and Olympic Boat Sales to recover for the cost of Henry's boat. The complaint alleged breach of warranty as well as products liability and negligence. The latter theories have been unified into a single cause of action under the Washington Product Liability Act (WPLA), RCW §§7.72.010-060. The WPLA has been construed in non-maritime matters to permit recovery for economic loss when a product fails in such a way as to present an unreasonable risk of harm to the user, whether or not the user is actually injured.

The Stantons brought a separate action which was identical to the Henry action in all respects except that it included a claim for loss of certain personal property on the Stanton boat. The actions were consolidated for trial.

The trial court granted summary judgment that petitioners' claims against both defendants under the WPLA were barred by East River, and that petitioners' warranty claims against Bayliner were barred under state law because petitioners and Bayliner did not have privity of contract. The trial court dismissed substantially all of petitioners' claims against Bayliner[1] and certified its ruling as a final, appealable order.

The court of appeals reversed and remanded for trial on the merits. Stanton v. Bayliner Marine Corp., 68 Wn. App. 125 (1992). The court held that petitioners' product liability claims were cognizable in admiralty jurisdiction, and

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[1] The trial court's ruling left intact the Stantons' claim for loss of personalty which was not equipment or furnishings of their vessel, and petitioners' claim against the dealer, Olympic Boat Centers.

assumed without deciding that East River applied despite the fact that petitioners' claims involved recreational boats. However, the court of appeals held that the WPLA could apply under Kossick v. United Fruit Company, 365 U.S. 731 (1961), "[b]ecause a significant state interest is at stake, and because its application would not unduly disrupt the uniformity of federal admiralty law." 68 Wn. App. at 131, A-22. The court held further that the WPLA could apply because it is a unification of contract and tort elements of product liability, and the contract claims are governed by state law in any event. Bayliner's petition for reconsideration was denied without opinion.

Bayliner's petition for review was granted by the Washington Supreme Court on March 31, 1993. The supreme court reversed the decision of the court of appeals in a 5-4 decision filed on December 30, 1993. The court ruled that East River applies to recreational as well as commercial vessels and precludes recovery for economic loss

in any action cognizable in admiralty which is brought in state court under the Savings To Suitors Clause, 28 U.S.C. §1333. The court agreed that Washington has a significant interest in allowing recovery for economic loss when a product fails in such a manner as to present a significant risk of harm to the user. However, the court stated that where there is an actual conflict between state and admiralty law, Kossick is inapplicable and state law is preempted regardless of the nature or weight of competing state and federal interests as to which law should be applied. The dissenting justices stated that East River does not preclude recovery for economic loss with respect to recreational boats as distinguished from commercial ones, and that even if it did preclude recovery in admiralty, the federal interest in uniformity as to the rule of law in question must be balanced against the state interest in having its law applied. Since the federal interest in denying recovery to recreational boaters is weak, and there is a strong state interest in providing a

remedy in order to deter the manufacture and dissemination of unsafe products, the dissenting justices would have remanded the case for trial on the merits.

Petitioners filed a petition for reconsideration on January 18, 1994. The petition was denied without opinion on March 10, and the mandate of the Washington Supreme Court was issued on March 14.

The following opinions are reprinted in the Appendix: the decision of the superior court dated October 9, 1990 (A-1 - A-6); the decision of the court of appeals filed August 17, 1992 (A-7 - A-23); the decision of the Washington Supreme Court dated December 30, 1993 (A-24 - A-77); the Order Denying Motion for Reconsideration dated March 10, 1994 (A-78 - A-79); and the Mandate of the Washington Supreme Court dated March 14, 1994 (A-80 - A-82).

## JURISDICTION OF THE SUPREME COURT

Petitioners seek review by writ of certiorari of the decision filed by the Supreme Court of the State of

Washington on December 30, 1993, under the captions James H. Stanton, Winnefred Stanton, et al., Respondents, v. Bayliner Marine Corporation, Petitioner, and Olympic Sales, Inc., Defendant, and Albany Insurance Company, Respondent, v. Bayliner Marine Corporation, Petitioner, and Olympic Sales, Inc., Defendant, No. 60031-7, reported at 123 Wash.2d 64 (1993). The petition for reconsideration was denied and the decision of the Washington Supreme Court became the decision terminating review in that court on March 10, 1994. The Mandate of the Washington Supreme Court was issued on March 14, 1994. This Petition for Writ of Certiorari invokes the jurisdiction of the Supreme Court under 28 U.S.C. §§1254(1) and 1257.

## CONSTITUTIONAL, STATUTORY, AND OTHER AUTHORITY INVOLVED

This Petition for Writ of Certiorari involves the question of how the Washington Product Liability Act should be applied in light of East River and numerous decisions by this Court concerning the accommodation of federal and

state interests in matters falling within federal admiralty jurisdiction as granted in Article III, Section 2 of the United States Constitution and implemented by 28 U.S.C. §1333.

## STATEMENT OF THE CASE

### I.

### INTRODUCTION

This Court ruled in East River that admiralty law did not afford the charterers of four 225,000-ton supertankers a remedy against the manufacturer in tort when turbines in the vessels' propulsion systems failed in such a way as to injure only themselves, causing only economic loss. The Court reasoned that contract remedies were adequate for commercial transactions of the sort involved in that case, because the parties could set the terms of their own agreement.

The Washington Product Liability Act (WPLA) created a single cause of action for product-related harms which preempts previously existing common law theories of

product liability. Washington Water Power v Graybar Electric Co., 112 Wn.2d 847, 855-56 (1989) (*en banc*). The WPLA provides recovery against manufacturers and sellers for "any damages recognized by the courts of this state: Provided, that the term 'harm' does not include direct or consequential economic loss under Title 62A RCW." RCW 7.72.010(6) (emphasis in the original).[2] In Graybar, a non-maritime case, a manufacturer argued that the term "economic loss" should be construed under RCW 7.72.010(6) in the same manner as in East River, to exclude recovery for "all damages attendant to the failure and loss of use of a product." 112 Wn.2d at 860. The Washington Supreme Court specifically rejected the East River approach on the ground that:

> The Court's analysis in East River, we believe, unjustifiably dismisses the safety concerns attendant to product injuries caused by hazardous defects. For this reason, we find East River's approach to economic loss

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[2] Title 62A is the section of the Revised Code of Washington pertaining to the law of sales.

> unsuited to what the legislature intended under the WPLA.

Id. at 864 (citations omitted, emphasis added). The court therefore held that damages attendant to the failure or loss of use of a product are recoverable under the WPLA when the product fails in such a way as to create an unreasonable risk of harm to the user, regardless of whether the user is actually injured. Id. at 867.

Notwithstanding its decision in Graybar, the Washington Supreme Court held in this case that when a recreational boat fails on navigable waters, but the passengers escape injury, the boat owner is barred by East River from recovering from the manufacturer for the cost of repairing or replacing the boat. The court failed to consider whether there are any differences between recreational boaters and commercial shipping interests which make the policies of East River inapplicable. The court also failed to consider whether there are any federal interests in uniformity which would prevent the application of state law

to petitioners' claim. The court concluded that state law is preempted without regard to the presence or absence of such interests whenever it conflicts directly with a rule of admiralty law.

Every year, thousands of consumers purchase recreational boats from dealerships in the state of Washington and elsewhere in the same manner as they would purchase automobiles and other consumer goods. The boats range from expensive yachts to small sailing boats, outboard motorboats, and even such things as jet skis, rubber rafts, and sailboards. Such consumers have neither the opportunity, bargaining power, nor the sophistication to negotiate with respect to the warranty provisions of their purchase agreements. At best they are likely to have only a generalized understanding that they are protected by whatever laws the state may have passed to protect consumers from defective products. Under the decision of the Washington Supreme Court, however, recreational

boaters are singled out from other consumers and deprived of the protections of their state's product liability act because of a decision by this Court concerning commercial shipping interests which are completely foreign to them. Such a result is unconscionable and must be reversed.

## II.

## FACTUAL BACKGROUND

In December 1985, James Stanton and Winnifred Stanton purchased the MOONRAKER for $225,342. In April 1988, Wiley Dean Henry purchased the CONTESSA for $251,548.70. The two boats were identical in design and construction, each being a 45-foot model 4550 Bayliner motor boat. That particular model was designed and manufactured by Bayliner for recreational use, and each boat was purchased solely for recreational purposes.[3]

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[3] The Stantons placed title to their boat under the name of their company, the Stanton Investment Company, for reasons unrelated to this litigation. The ownership, operation, or use of the boat was no part of the business of the Stanton Investment Company, and it is conceded that the boat was purchased solely for recreational purposes.

Each boat was purchased from Olympic Boat Centers in Seattle, Washington. The sales contracts for the two boats were on identical pre-printed forms, despite the fact that the sales occurred more than two years apart. Both boats were insured by petitioner Albany Insurance Company.

Each boat struck an underwater object and sank in navigable waters while on a pleasure cruise. The MOONRAKER struck a submerged rock near Mats Mats Bay in Puget Sound. The CONTESSA struck a reef near Comax Air Force Base, Vancouver Island, Canada. Each boat was determined to be a constructive total loss. Albany reimbursed the Stantons and the Henrys according to the terms of their policies and became subrogated to their interests in the boats.

The facts of these cases illustrate well the state's concern for the hazards to which consumers may be exposed by defective products. When the vessels grounded their keels were penetrated in such a way as to produce sudden and

massive flooding. The skippers of both boats sent out distress calls on marine band radio as their vessels began to sink. The MOONRAKER sank in 12 minutes, according to the testimony of Mrs. Stanton. Its passengers were fortunate that there were other boaters nearby who could rescue them before their boat sank. The passengers on the CONTESSA had to be rescued by a marine helicopter dispatched from Comax Air Force base. They were fortunate that their vessel grounded on rocks which prevented it from sinking rapidly like the MOONRAKER.

The facts also illustrate the state's interest in deterrence. In the courts below petitioners submitted an affidavit from a naval architect who would have testified that the groundings experienced by the MOONRAKER and CONTESSA are a relatively common occurrence which should have been anticipated by Bayliner, and the mass floodings which occurred or those boats resulted from a design defect in the Bayliner Model 4550 which could easily

have been corrected by the use of relatively inexpensive design techniques such as installing foam or a similar substance inside the keel and capping the keel with fiberglass.

The Washington Supreme Court held nevertheless that East River bars states from protecting their consumers in the manner provided by the WPLA, merely because the goods in question were boats which failed on navigable waters. There is nothing in the facts or holding of the East River decision, the needs of the recreational boating industry, or the maritime doctrine of uniformity, to require such a result.

## REASONS FOR GRANTING THE WRIT.

### I.

### THE WASHINGTON SUPREME COURT ERRED IN RULING THAT EAST RIVER APPLIES TO CONSUMER AS WELL AS COMMERCIAL PRODUCTS.

#### A. A Need Exists to Eliminate The Uncertainty and Inconsistency Among Lower Courts As To Whether East River Applies to Recreational Boats.

In Sherman v. Johnson & Towers Baltimore, Inc., 760 F. Supp. 499 (D. Md. 1990), a suit was brought against the manufacturer by the buyers of a yacht destroyed by fire. The court recognized that the action was in admiralty jurisdiction, 760 F. Supp. at 500, but held that East River did not bar the plaintiff's tort claims, because East River does not apply when the purchaser of the defective product is a consumer. 760 F. Supp. at 502.

In addition to Sherman, there are several other decisions which interpret East River as being inapplicable to consumer goods. In Employers Insurance of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752 (5th Cir.

1989), which held that East River applies to contracts for professional services rendered in connection with the manufacturing or construction of a product by a party other than the manufacturer, the court interpreted the rule of East River as being limited to commercial users as distinguished from non-commercial ones. 866 F.2d at 764-65. Similarly, in Richard O'Brien Cos. v. Challenge-Cook Bros., Inc., 672 F. Supp. 466 (D. Colo. 1987), the court held that provisions of state law similar to the rule of East River prevented purchasers of defective pumps from recovering from the manufacturers when the only loss was to the product itself. The court distinguished Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983, 989 (1975), which allowed recovery of similar damages by a non-commercial purchaser of a mobile home. Citing East River, the court stated that non-commercial plaintiffs can recover in tort for injury to the product itself, but commercial plaintiffs may not do so. 672 F. Supp. at 472 (emphasis added). Finally, in Consumers

Power Co. v. Mississippi Valley Structural Steel Corp., 636 F. Supp. 1100 (E.D. Mich. 1986), state law was held to bar recovery by the owners of a nuclear power plant from the manufacturer of component parts for economic loss resulting from manufacturing defects. The court distinguished between commercial and non-commercial transactions on the basis that "the argument to limit the parties to their contractual remedies is much stronger in the purely commercial setting than it is when consumer claims are involved." 636 F. Supp. at 1108. When the distinction between commercial and non-commercial transactions was challenged on motion for rehearing, the court cited East River as authority that the distinction is valid. 636 F. Supp. at 1112-13.

On the other hand, Karshan v. Mattituck Inlet Marina & Shipyard, Inc., 785 F. Supp. 363 (E.D.N.Y. 1992), and Lewinter v. Genmar Industries, Inc., 1993 AMC 939 (Cal.Super.Ct. 1993), hold that East River applies to

consumer as well as commercial goods. Karshan involved a suit by the owner and underwriters of a yacht against the seller to recover for property damage resulting from a fire on the yacht. The court held that the product liability claim was barred by East River even though the vessel was a consumer good. 785 F.Supp. at 365-66. Lewinter involved an action by the owner of a yacht against a remote manufacturer to recover for the value of the yacht after it sank because of defective lamination. The court held that the action was cognizable in admiralty, and the owner's negligence and strict liability claims were barred by East River despite the fact that there was neither privity of contract nor a "commercial relationship" between the owner and the manufacturer. 1993 AMC at 943-945.

In addition to Karshan and Lewinter, there are several other decisions which interpret East River as being applicable to consumer as well as commercial goods. In Simon v. Genmar Industries, 1989 AMC 2627 (S.D.N.Y.

1989), which held that the owner of a yacht had no claim under state law against the manufacturer for negligence which caused gelcoat blisters to develop on the hull, the court stated in dictum that East River would have mandated the same result if admiralty jurisdiction had been found to apply. 1989 AMC at 2629.

In Sisson v. Hatteras Yachts, 1991 WL 47543 (N.D. Ill. 1991), suit was brought for damages which resulted when the washer-dryer unit on a yacht caused a fire which destroyed that yacht and several adjacent ones. The owners of the yacht where the fire originated contended that East River did not bar their claim against the manufacturer of the washer-dryer unit for damages to their own boat, because they had no "commercial relationship" with the manufacturer. The court rejected that contention on the ground that East River applies to parties throughout the chain of distribution. 1991 WL 47543, p. 2. It appears from the opinion that the court considered only the application of

East River to parties not in privity of contract with the manufacturer. Nevertheless, both the Washington Supreme Court and the court in Lewinter rely on the Sisson decision as authority that East River applies to consumer as well as commercial goods.[4]

The Washington Supreme Court also cited several land-based cases which have interpreted East River as applying to consumer goods. Dairyland Ins. Co. v. General Motors Corp., 549 So.2d 44 (Ala. 1989) (East River was applied to deny recovery in tort to the buyer of a noncommercial van which caught fire and was destroyed while being driven); Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649 (Okla. 1990)(East River was

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[4] The Washington Supreme Court cited erroneously to Sisson v. Hatteras Yachts, 778 F. Supp. 959 (N.D. Ill. 1991), a later decision in the same litigation which had also been cited to them by respondent. That decision involved a suit by the underwriter of the yacht where the fire originated against the manufacturer as assignee of the claims of adjacent yachts destroyed by the fire. The claims were denied upon the basis of a factual determination as to the proximate cause of the fire. East River was clearly inapplicable, inasmuch as the suit was for damage to the property of third parties rather than economic loss.

applied to deny recovery in tort to the buyer of a mobile home for defective roofing); and Danforth v. Acorn Structures, Inc., 608 A.2d 1194 (Del. 1992)(East River was applied to deny recovery in tort to the buyer of a home building kit).

In all, the Washington Supreme Court cited seven cases in favor of Bayliner's contention that East River applies to consumer goods, and four cases in favor of petitioners' contention that it does not apply. The court then concluded that "On balance, the weight of authority interprets East River's maritime product liability rule as applicable to both commercial and consumer transactions." 123 Wn.2d at 79, A-50. Apart from referring to the opinions of some of the cases which it cited, the court made no attempt to analyze the considerations which led to the East River decision or determine whether those considerations apply to consumer goods in the same manner as to commercial shipping transactions. This Court should grant

certiorari in order to eliminate the confusion among the lower courts and provide a principled determination of whether the elimination of a tort remedy for economic loss is appropriate for recreational boats as well as commercial ships.

**B. East River Does Not Apply to Recreational Boats.**

The facts of East River have no relation to recreational boats. East River involved four 225,000-ton supertankers, each costing $125,000,000.00 at 1969 prices. Each supertanker was constructed by a sophisticated international shipping concern and then transferred to the plaintiffs under 20-year demise charters. The plaintiffs were sophisticated commercial entities which intended to use the supertankers in the worldwide petroleum trade. Petitioners, on the other hand, were unsophisticated consumers who purchased their boats from a dealership for recreational purposes in the same manner as a consumer would purchase an automobile or other consumer goods.

Moreover, the holding in East River does not purport to apply to consumer transactions. The Court defined the issue in East River as follows:

> [W]hether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation.

476 U.S. at 866 (emphasis added). See also 476 U.S. at 859, where the Court referred to products purchased "in a commercial transaction." The Court then stated its holding as follows:

> [A] manufacturer in a commercial relationship has no duty under either a negligence or strict liability theory to prevent a product from injuring itself.

476 U.S. at 871 (emphasis added). The Court referred to the case of Seely v. White Motor Company, 67 Cal.2d 9, 403 P.2d 145 (1965), which also involved a product purchased for

commercial use. There is nothing in the holding which refers to consumer products or their users or manufacturers.[5]

Finally, the rationale of the East River decision has no application to consumer goods. Although the term "commercial relationship" as used in East River is ambiguous, and could be construed to refer to any type of sales transaction, the reasoning of the Court indicates that the decision applies to products purchased for commercial use rather than consumer goods. The Court expressed concern for keeping product liability and contract law in separate spheres, 476 U.S. at 871. However, that concern was discussed in the context of transactions where there is a meaningful negotiation of the contract terms, so that there is no countervailing reason to intrude into the parties' allocation of risk. 476 U.S. at 872-873. The Court stated that:

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[5] Moreover, the Court in East River specifically declined to decide whether a tort cause of action could ever be stated in admiralty when the only damages sought are economic. 476 U.S. at 871, n.2.

> [W]hen a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased cost in performing a service.

476 U.S. at 871 (emphasis added). The Court then stated that public policy does not require the special protections of tort liability for commercial users, because:

> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case, because the parties may set the terms of their own agreements.

476 U.S. at 872-73 (emphasis added). The Court added that while warranty and products liability are not static bodies of law, and may overlap, "the latter seem to us far more appropriate for commercial disputes of the kind involved here." 476 U.S. at 873, n.8 (emphasis added). Citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the Court concluded that:

> Since a commercial situation generally does not involve large disparities in bargaining power, we see

> no reason to intrude into the parties' allocation of risk. 476 Us. at 873 (emphasis added).

Thus, the decision in East River was based in the Court's conclusion that in commercial transactions, the parties are able to protect their interests by setting the terms of their own agreements. That rationale has no application to the present case. Stanton and Henry, like most recreational boaters, were ordinary consumers who had no meaningful opportunity to set the terms of their transactions. The boats were mass-produced consumer goods which they purchased from a dealer pursuant to a standardized contract prepared by the manufacturer or seller. The buyers had neither the sophistication nor the opportunity to negotiate with respect to contract provisions which purported to define the scope of the manufacturer's liability.

The Court in East River also expressed concern for maintaining a realistic limitation on damages. 476 U.S. at 871 and 874. That concern is likewise inapplicable to consumer goods, because the lack of a commercial purpose

provides a built-in limitation on liability. With no loss of anticipated profits, the consumer's claim for economic loss will virtually always be limited to repair or replacement costs.

**C. The Extension of East River to Recreational Boats Would Intrude Unduly Into Areas Where the States Should Retain the Power to Legislate.**

In Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982), and Sisson v. Ruby, 497 U.S. 358 (1989), this Court held that admiralty jurisdiction extended to tort claims involving, respectively, a collision between pleasure boats on navigable waters and a fire on a yacht which damaged other yachts at a marina on navigable waters. In the present case the Washington Supreme Court equated jurisdiction with choice of law by reasoning in effect that since Foremost and Sisson were based in part on a need for uniform rules of maritime conduct, there is necessarily a need for a uniform rule whenever admiralty jurisdiction applies to cases involving recreational boats. 123 Wn.2d at 86-87, A-63 - A-

66. The Washington court read Foremost and Sisson much too broadly. This Court's power to fashion rules of admiralty law depends upon admiralty jurisdiction. By upholding admiralty jurisdiction in Foremost and Sisson, the Court preserved its power to fashion rules pertaining to recreational boats when necessary. However, the Court did not purport to require uniformity with respect to every issue involving recreational boats. In fact, admiralty jurisdiction under Foremost and Sisson extends to many cases which are sufficiently remote from traditional concerns of maritime commerce that the preemption of state law would improperly intrude upon the role of the states in our federal system.

For example, in Matter of Skyrider, 1990 WL 192479 (D.Hawaii 1990), admiralty jurisdiction was upheld in a case involving a fall by a parasailer. In Byrd v. Byrd, 657 F.2d 615 (4th Cir. 1981), admiralty jurisdiction was upheld when a wife brought suit against her husband for injuries she

sustained when her deck chair fell from the bridge of their pleasure boat. In Ratcliff v. United Services Automobile Association, 180 So.2d 58 (La. 1965), admiralty jurisdiction was upheld when a passenger brought suit for injuries caused by exposed metal studs on the boat's engine. Admiralty jurisdiction has been upheld in many cases of accidents involving jet skis. Calhoun v. Yamaha Motor Corp., 1993 WL 218833 (E.D.Pa. 1993); Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1992); Lipworth v. Kawasaki Motors Corp. U.S.A., 592 So.2d 1151, cert. den., 113 S. Ct. 465, 121 L. Ed. 2d 373 (1992); Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151 (S.D.Fla. 1992); and Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225 (11th Cir. 1990). Admiralty jurisdiction has likewise been upheld in many cases involving waterskiing accidents. Rubin v. Brutus Corp., 487 So.2d 360 (Fla. 1986); Hogan v. Overman, 767 F.2d 1093 (4th Cir. 1985); Blevens v. Sfetku,

*66 Cal.Rptr. 486 (1968)*; and Isaacson v. Jones, 216 F.2d 599 (9th Cir. 1954).

Many of the foregoing cases involved injuries which did not implicate the issues addressed in East River. However, admiralty jurisdiction is likely to be upheld under Foremost, Sisson, and East River where the jet ski, parasail, motorboat or sailboard breaks down on navigable waters due to a manufacturing defect, causing only economic loss.[6] The fact that uniform federal rules may prove necessary for certain activities of such craft, such as navigational activities, does not mean that state law should be preempted in all respects. To hold that state product liability remedies are forbidden to the buyers of jet skis, sailboards, parasails, or motorboats, merely because the remedy under state law is inconsistent with East River, is an unwarranted usurpation

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[6] The Supreme Court held in East River that a product liability claim involving a commercial vessel which fails in maritime commerce on navigable waters is within admiralty jurisdiction. 476 U.S. at 863-64.

of matters as to which the states should also retain the power to act.

## II.

## THE WASHINGTON SUPREME COURT ERRED IN RULING THAT STATE LAW IS PREEMPTED WITHOUT THE NEED TO BALANCE STATE AND FEDERAL INTERESTS.

As discussed in Sections III and IV of this petition, infra, the Washington Supreme Court did not properly consider the competing state and federal interests in choice of law. Moreover, the court's very superficial discussion of state and federal interests is incurably tainted by its declaration of the legal standard to be applied in deciding the choice of law issue. The supreme court ruled that the WPLA's definition of economic loss is preempted as to maritime matters because:

> Although Kossick endorsed the notion of balancing local concerns against federal interests in some circumstances, it does not stand for the proposition that state law may displace conflicting federal law.

123 Wn.2d at 82, A-55 (emphasis in the original). The court stated further that:

> [I]t is Graybar's definition of "economic loss" which does not follow East River's analysis, that creates a conflict between the state and federal remedies. This conflict requires application of the federal admiralty rule of East River.
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> ***
>
> [T]he court need not engage in "interest analysis" where there is a conflict between the state and federal remedies for economic loss; such conflicts are resolved in favor of federal maritime law.

123 Wn.2d at 83-84, A-58 - A-59 (emphasis added). These statements indicate that the Washington Supreme Court applied an improper legal standard in determining that state law was preempted.

This Court held in Kossick v. United Fruit Company, 365 U.S. 731 (1961), that an employer's agreement to assume responsibility for treatment received by a seaman at a Public Health Service Hospital should be judged by the admiralty rule permitting enforcement of oral contracts, rather than the state statute of frauds, because the contract

was one which could have been made anywhere in the world and should be governed by one law wherever made. 365 U.S. at 741. However, the Court specifically rejected the view that "wherever a maritime issue is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant." 365 U.S. at 739. The Washington court's conclusion that Kossick does not permit state law to displace "conflicting federal law" is inconsistent the statement in Kossick that:

> [T]he process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of law situation where two sovereignties assert divergent interests in a transaction as to which both have some concern.

Id. The "process of accommodation" referred to in Kossick would be meaningless if it occurred only in the absence of conflict between state and federal law, as held by the Washington Supreme Court. In fact, this Court has recognized in many cases that state law can be

accommodated when it stands in the same relationship to federal admiralty law as the definition of "economic loss" under the WPLA.

The uniformity doctrine enunciated in Jensen actually originated with Justice Bradley's opinion in The Lottawanna, 88 U.S. 558, 575 (1874); Southern Pacific Co. v. Jensen, 244 U.S. at 215. Ironically, the Court recognized in The Lottawanna that state-created liens for supplies furnished to a vessel in her home port could be enforced even though maritime law did not afford a lien, because Congress had not yet adopted a uniform lien statute and the state liens did not offend against the basic principles of maritime law. See also Peyroux v. Howard, 32 U.S. 324 (1833), and The Orleans, 36 U.S. 175 (1837). State law should be applied in the present case for the same reasons.

In The Harrisburg, 119 U.S. 199 (1886), this Court held that general maritime law did not provide a remedy for wrongful death. As a result, this Court held in numerous

cases that state statutes could be applied to provide a remedy for wrongful death in state territorial waters. The Hamilton, 207 U.S. 398 (1907); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). State wrongful death statutes were applied until Congress enacted legislation intended to create a uniform remedy for maritime wrongful death. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 230 (1986).

Likewise, the Court held in Just v. Chambers, 312 U.S. 383 (1941), that in the absence of a maritime rule providing for survival of causes of action, state survival statutes can be applied to maritime causes of action.

The Washington Supreme Court's conclusion that state law must be preempted whenever it conflicts with a rule of maritime law is a "destructive oversimplification of the highly intricate interplay of the States and the National Government in maritime commerce." Romero v. Int'l Term. Operating Co., 358 U.S. 354, 373 (1959). Justice Frankfurter acknowledged in Romero that "state law must yield to the

needs of a uniform federal maritime law when this Court finds inroads on a harmonious system," 358 U.S. at 373. However:

> [T]his limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced their statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance - all these rules and others have been accepted as rules of decisions in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.358 U.S. at 373-74 (emphasis added).

Justice Frankfurter's statement was reaffirmed in Askew v. American Waterways, 411 U.S. 325, 338 (1973), which held that concerns for uniformity did not bar enforcement of a state statute imposing liability in excess of federal standards for oil-spill damage to the state or its

residents. The Court stated in Askew that Jensen and its progeny "have been limited by subsequent holdings of this Court," are "confined to their facts," and "mark isolated instances" in which state law must be preempted. 411 U.S. at 338 and 343.

The most recent application of the uniformity doctrine is American Dredging Company v. Miller, 114 S. Ct. 981, 61 U.S.L.W. 4130 (1994), in which this Court upheld the application of a Louisiana statute barring application of the maritime doctrine of forum non conveniens to maritime cases are filed in state court under the Jones Act or the saving to suitors clause. While Miller can be distinguished from the present case on the basis that the Louisiana statute was procedural rather than substantive, such a distinction would belie the much broader grounds upon which the case was decided. Citing Jensen, the Court stated that:

> The requirement of uniformity is not, however, absolute. As Jensen itself recognized: "It would be difficult, if not impossible, to define with exactness just how far the general maritime law may be

> changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied." 114 S. Ct. at 986.

The Court concluded, citing Jensen and Madruga v. Superior Court of California, 346 U.S. 556, 561 (1954), that the Louisiana statute could apply because it did not:

> work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony of that law in its international and interstate relations. 114 S.Ct. at 985.

Thus, the Washington Supreme Court's holding that it "need not engage in interest analysis where there is a conflict between the state and federal remedies for economic loss", 123 Wn.2d at 84, A-59, is incompatible with the many decisions of this Court concerning the interplay between state and federal interest in maritime matters.

## III.

## THE WASHINGTON SUPREME COURT ERRED IN SUBORDINATING THE STATE'S INTEREST MERLEY BECAUSE MARITIME MATTERS WERE NOT SPECIFICALLY ADDRESSED IN A STATUTE OF GENERAL APPLICATION.

This Court stated in East River that "the charterers do not ask us to defer to the law of New Jersey, the forum State. Nor is the application of state-law principles required here. New Jersey lacks any pressing and significant interest in the tort action." 476 U.S. at 864, n.2. The reasons for the forum state's lack of interest stems from the nature of the transactions involved in East River. Such transactions are few in number and highly particularized. They are also unlikely to have a significant nexus with the forum state. The vessel is likely to be built and in another state or foreign country, employed in regions distant from the forum state, and crewed by seamen who do not reside in the forum state. Even if the buyer of the vessel is a local resident, it is likely to have enough sophistication, bargaining strength, legal and

technical assistance to protect its own interests with regard to product safety. In such circumstances the forum state has no pressing interest in intruding into the parties' contractual allocation of risk. In contrast, recreational boats are marketed and sold locally in large numbers. The buyers typically reside and use their boats in the state of purchase. They frequently lack the knowledge or bargaining strength necessary to protect their interests as to product safety. It has been recognized for many years that state legislatures have a significant interest in determining the extent to which local consumers require the protection of product liability laws. That interest applies with particular force to recreational boaters, because of the potentially disastrous consequences of a product failure in circumstances where the boaters' lives can be endangered.

The court of appeals recognized in the present case that the interpretation of "economic loss" under the WPLA could apply in lieu of the more restrictive interpretation in

East River "[b]ecause a significant state interest is at stake...." 68 Wn.App. at 131, A-22. The supreme court acknowledged in the present case that "the Court of Appeals properly concluded that Washington has a significant interest in a divergent interpretation of economic loss...." 123 Wn.2d at 74, A-39 (emphasis added). Although the court stated that "Washington's interest in providing a remedy for these plaintiffs does not outweigh federal interests in maritime uniformity," 123 Wn.2d at 84, A-59, and that "Washington does have an interest in preserving appropriate remedies for personal injury; the loss at issue in this case, however, is purely economic," 123 Wn.2d at 85, A-62, the court recognized thereafter that "The Graybar court ...found East River's approach unsuited to what the legislature intended under the WPLA....the Graybar court carefully analyzed the statute and concluded that the WPLA incorporates the risk of harm analysis." 123 Wn.2d at 85, A-62 (emphasis added). The Washington Supreme Court subsequently reaffirmed the

risk-of-harm analysis, and Graybar's rejection of East River, in Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction, Inc., 119 Wn.2d 334 (1992). As indicated in Graybar, the reason for incorporating the risk of harm analysis was to avoid injuries to consumers by deterring the manufacturing and dissemination of unsafe products. Graybar, 112 Wn.2d at 864. However, the court concluded in the present case that the state's "significant interest in a divergent interpretation of economic loss" was insufficient to withstand federal preemption in the absence of some showing that the legislature had considered and specifically intended for state law to apply in maritime as well as other matters. The court stated that "there is no indication by the Legislature or this court that Washington's interests in deterring the manufacture and dissemination of dangerous products outweigh the need for a uniform maritime law of products liability...there is no support for a rule of exception for economic loss in maritime products

liability cases based on Washington law." 123 Wn.2d at 85-86, A-62 - A-63 (emphasis added). The court gave no other reason why the state's interest should be subordinated to a need for uniformity, whatever that need may be in this case.

The court's analysis of the state's interest is exactly the reverse of what it should be. The question is not whether the state law creates an exception to maritime law, but instead whether and to what extent the needs of the maritime system compel an exception to state law. The court's holding places a wholly unrealistic burden on state legislatures to remember to address maritime matters specifically when enacting legislation for general application. It also creates a wholly unjustified need to resort to legislative history in order to determine the intention of the legislature when weighing state and federal interests in maritime matters. Finally, the court's reference to the absence of prior "indications...by this court" tends to deny recreational boaters their day in court by suggesting that a

factor in weighing the state and federal interests is whether the state court somehow discussed the relative importance of those interests before being called upon to decide that issue.

Thus, the Washington Supreme Court should have presumed that the legislature intended its law to apply to recreational boats because it is clearly appropriate for such products, and the legislature did not provide otherwise. In fact, the WPLA as construed in Graybar is particularly appropriate for recreational boats because boating is a popular recreational activity, and boaters are frequently in situations where their lives could be endangered if their boat were unsafe.

In Davis v. Department of Labor, 317 U.S. 249 (1943), this Court held that the widow of a steel worker who was drowned after being knocked from a barge into the Snohomish River could recover under the state workmen's compensation law. Citing South Carolina State Highway

Department v. Barnwell Brothers, 303 U.S. 177 (1938), which upheld enforcement of a state statute limiting the size and weight of motor trucks on state highways, the Court stated that state law is not automatically displaced by federal law, 317 U.S. at 254, and that where federal authorities have not determined that state law may not apply, the application of state law must be presumed constitutional. 317 U.S. at 256-57.

The presumption of constitutionality of state law is a general one which applies in all areas of overlapping state and federal interest.

> When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of the courts, but for the legislative body, on which rest the duty and responsibility of decision. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to

> substitute their own for the legislative judgment.

South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. at 191 (citations omitted).

The presumption of constitutionality invoked in Barnwell and Davis applies as well to the present case. The Washington legislature has determined that in order for consumers who purchase goods within the state to be protected from the dissemination of unsafe manufacturing practices, a remedy must be provided for economic loss when the product fails in such a way as to create an unreasonable risk of harm to the user. There has been no determination by federal authorities that the application of the state law to recreational boats is unconstitutional.[7] Therefore, Washington law should apply absent a showing of a specific need for a uniform rule of federal law.

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[7] The Court in East River specifically stated that even in the context of commercial transactions, the issue of application of state law was not before it. 476 U.S. at 864, n.2.

## IV.

## THE WASHINGTON SUPREME COURT ERRED IN FAILING TO CONSIDER WHETHER THERE IS ANY FEDERAL INTEREST IN A UNIFORM LAW OF PRODUCT LIABILITY FOR RECREATIONAL BOATS.

### A. State Law Remedies Are Not Barred As To Maritime Matters Merely Because A Remedy Is Unavailable Under Admiralty Law.

In Exxon Corp. v. Central Gulf Lines Inc., 111 S.Ct. 2071 (1991), the Supreme Court held that agency contracts are not per se excluded from admiralty jurisdiction. Citing Sisson v. Ruby, the Court stated that "the admiralty jurisdiction is designed to protect maritime commerce...the demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it has gone to far." 111 S.Ct. at 2076-2077. Those considerations apply as well to the uniformity doctrine, which is but a consequence of admiralty jurisdiction and has the same purpose of protecting maritime commerce. In Davis v. Department of

Labor, this Court stated that Jensen requires a factual determination of whether application of the state law at issue would "interfere with the proper harmony and uniformity of maritime law." 317 U.S. at 254. In determining that there is a need for uniformity in the present case, the Washington Supreme Court did nothing more than allude to general statements by other courts about "the need for uniform rules of maritime conduct and liability...."123 Wn.2d at 86, A-63. The court made no attempt whatever to address the specific question of whether there is a need for a uniform rule with respect to the liability of manufacturers to consumers for economic loss.

In American Dredging Company v. Miller, supra, this Court upheld a state statute barring application of the federal doctrine of forum non conveniens to maritime cases filed in state court, because the federal doctrine of foreign non conveniens "neither originated in admiralty nor has its exclusive application there. To the contrary, it is and has

long been a doctrine of general application." 114 S.Ct. at 987. The Court reasoned further that the application of the state law could not be said to unduly interfere with the uniformity of maritime law, because preemption of the state law would not produce uniformity in any event. 114 S.Ct. at 987 and 989. The same considerations apply to the instant case.

**B. The Rule of East River Is Not A Characteristic Feature of Admiralty Law.**

Product liability claims are of relatively recent origin. It was not until the East River decision in 1986 that product liability was established as a part of maritime law. 476 U.S. at 863-866. Prior to East River, the trend among courts which recognized product liability claims in admiralty was to allow recovery when the only damage was to the product itself. Jig the Third Co. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171 (9176); Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468 (9th Cir. 1984); Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir.

1984). Thus, while the rule of East River is now established with respect to commercial vessels, it is certainly not a characteristic feature of maritime law. Moreover, the cases cited in Section II of this memorandum indicate clearly that the rule of East River is not even an established rule of maritime law with respect to consumer goods.

**C. The Application of State Law Is a Characteristic Feature of Disputes Involving the Construction and Sale of Ships.**

Moreover, a characteristic feature for more than a century has been that contracts for the construction and sale of ships lie outside admiralty jurisdiction and are governed by state law. People's Ferry Company v. Beers, 61 U.S. 393, 402 (1857). In Thames Towboat Company v. Schooner Frances McDonald, 254 U.S. 242 (1920), this Court held that such contracts:

> . . . are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately

> connected with navigation and commerce by water.

254 U.S. at 244. See also The ADA, 250 F. 194 (2d Cir. 1918). This Court acknowledged in East River that ship construction and sales contracts lie outside admiralty jurisdiction and are governed by state law. 476 U.S. at 872, n.7. Neither Congress nor this Court have ever sought to change that rule.

This Court has held in other cases that the non-maritime nature of ship construction contracts justifies the application of state law to casualties arising therefrom. In Grant Smith-Porter Ship Company v. Rohde, 257 U.S. 469 (1922), the Supreme Court held that a state workman's compensation statute could apply to a carpenter employed at a shipyard on the Willamette River who was injured while constructing a bulkhead on a vessel which had been launched but was still under construction. The worker's injury was within maritime jurisdiction at the time the case was decided. The Plymouth, 7 U.S. 20 (1866). The Court

held nevertheless that the injury was "maritime-but-local", and state law could apply, because shipbuilding is not maritime activity. Citing Thames Towboat, supra, the Court stated that:

> The contract for construction of [the vessel] was non-maritime, and although the uncompleted structure upon which the accident occurred was lying within navigable waters, neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce.

257 U.S. at 475-76. Rohde is still good law, having formed part of the basis for decisions by this Court that state and federal workmen's compensation statutes can apply concurrently to maritime but local injuries. Calbeck v. Travelers Insurance Company, 370 U.S. 114, 116 (1962); Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 717 (1980). Thus, claims arising from the construction and sale of ships have always been characterized by the application of diverse state laws. Moreover, the Supreme Court acknowledged in East River that "warranty and products liability are not static

bodies of law, and may overlap." 476 U.S. at 873, n.8. Since state law will continue to govern warranty claims, 476 U.S. at 872, n.7, the preemption of state law with respect to the product liability elements will not produce uniformity in any event and therefore will not serve any federal purpose that justifies the preemption of state law. The Washington Supreme Court completely ignored these considerations.

**D. State Product Liability Law Should Be Applicable To All Product Liability Claims Involving Recreational Boats, Because Many Such Claims Fall Outside Admiralty Jurisdiction.**

Maritime law is inapplicable to casualties occurring on non-navigable waters, because such casualties are not cognizable in admiralty. Sisson v. Ruby, 497 U.S. at 362; Foremost Ins. Co. v. Richardson, 457 U.S. at 670; Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). Three Buoys Houseboat Vacations U.S.A. v. Morts, 921 F.2d 775 (8th Cir. 1990), cert. denied, 112 S. Ct. 272, 116 L. Ed. 2d 225 (1991) (admiralty jurisdiction did not apply to an accident between a service boat and a houseboat on the

Lake of the Ozarks in Missouri, because the lake was not navigable); Edwards v. Hurtel, 717 F.2d 1204 (8th Cir. 1983); (admiralty jurisdiction did not apply to an accident on a recreational lake which was not susceptible to use for commercial shipping); Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975) (admiralty jurisdiction did not apply when a discharge of water caused a boat to capsize on a non-navigable river). For example, in Smith v. Hustler, Inc., 514 F.Supp. 1265 (W.D. La. 1981), admiralty jurisdiction was held inapplicable to an action against the manufacturer of a quick-disconnect device which failed on a motorboat in non-navigable waters. Although the claim in Smith was for bodily injuries, it could just as easily have been for the kind of economic loss involved in the instant case.

In American Dredging Company v. Miller, this Court recognized that preemption of state law on grounds of uniformity is not justified where uniformity is unlikely to result in any event. 114 S.Ct. at 986, 989. Recreational boats,

unlike commercial vessels, are used on non-navigable waters in large numbers. It benefits only the manufacturers, and serves no legitimate federal purpose, to hold that while manufacturers are subject to liability under state law for economic loss claims involving recreational boats on non-navigable waters, they are exempt from liability for similar claims arising on waters which are navigable.

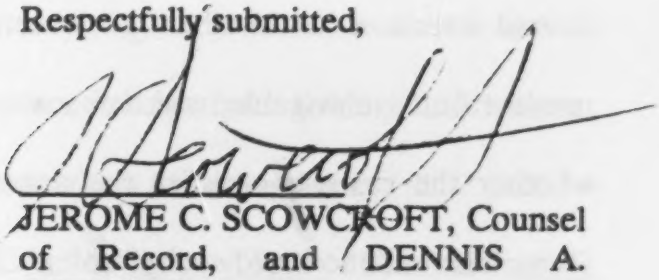
Similarly, the Court in Sisson v. Ruby did not purport to define all of the circumstances in which casualties involving recreational boats on navigable waters will be held to satisfy the nexus test for admiralty jurisdiction. It is quite possible at present that many product liability claims involving recreational boats on navigable waters will fall outside admiralty jurisdiction, particularly if the claim involves only economic loss rather than damage to other users of the waterways. Therefore, if the rule of East River is allowed to preempt state law as to recreational boats, there will be no certainty as to the circumstances in which

economic loss will be recoverable. There is a significant potential for transforming ordinary economic loss claims into constitutional tests of the limit of admiralty jurisdiction. The right to recover will be made to depend upon difficult factual issues as to whether the waterway on which the product fails is navigable, and if the waterway is navigable, whether the casualty satisfies the nexus test of Sisson v. Ruby. The need to avoid such problems formed the basis of a series of rulings by this Court that state and federal workmen's compensation statutes can apply concurrently to workmen injured in maritime employment. Parker v. Motorboat Sales, Inc., 314 U.S. 244, 249-250 (1942); Calbeck v. Traveler's Insurance Company, 370 U.S. 114, 120-122, 124 (1962); Sunship, Inc. v. Pennsylvania, 447 U.S. 715, 725-26 (1980). The same considerations mandate the application of state law to product liability claims involving recreational boats.

## CONCLUSION

For the foregoing reasons, review by this Court is appropriate and certiorari should be granted.

Respectfully submitted,



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